

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DANIELLE R. CHRISTENSEN,

Plaintiff,

v.

CAROLYN W. COLVIN, Commissioner
of Social Security,¹

Defendant.

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No. CV-11-00316-CI

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT are cross-motions for Summary Judgment. ECF No. 13, 19. Attorney Maureen J. Rosette represents Danielle R. Christensen (Plaintiff); Special Assistant United States Attorney Richard A. Morris represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 7. After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Defendant's Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

JURISDICTION

On November 10, 2008, Plaintiff protectively filed a Title II

¹Carolyn W. Colvin became the Acting Commissioner of Social Security on February 14, 2013. Pursuant to FED. R. CIV. P. 25(d), Carolyn W. Colvin is substituted for Michael J. Astrue as the Defendant in this suit. No further action need be taken to continue this suit. 42 U.S.C. § 405(g).

1 application for a period of disability and disability insurance
2 benefits and a Title XVI application for supplemental security
3 income, alleging disability under both claims beginning November 1,
4 2005. Tr. 17; 151-52. In her application for benefits, Plaintiff
5 reported that she stopped working due to her back, degenerative disc
6 disease, herniated disc, nerve damage, and numbness in her hands,
7 leg and feet. Tr. 156. Plaintiff's claim was denied initially and
8 on reconsideration, and she requested a hearing before an
9 administrative law judge (ALJ). Tr. 69-83. A hearing was held on
10 December 17, 2009, at which Vocational expert Fred Cutler, and
11 Plaintiff, who was represented by counsel, testified. Tr. 36-68.
12 ALJ Paul Hebda presided. Tr. 36. The ALJ denied benefits on
13 January 15, 2010. Tr. 17-29. The instant matter is before this
14 court pursuant to 42 U.S.C. § 405(g).

15 **STATEMENT OF THE CASE**

16 The facts of the case are set forth in detail in the transcript
17 of proceedings and are briefly summarized here. At the time of the
18 hearing, Plaintiff was 31 years old, and lived in a three-level
19 house with her fiancé and her eight year old daughter. Tr. 41-43.
20 She has a high school diploma, and obtained a nurse assistant
21 license. Tr. 42. While working as a nursing assistant, Plaintiff
22 injured her back. Tr. 44. After the injury, she worked light duty,
23 but eventually she was not able to continue working at that job due
24 to back pain. Tr. 45.

25 Plaintiff testified that her knees sometimes give out, she has
26 numbness in her hands, and constant pain in her left leg. Tr. 47.
27 She said she cannot bend over to shave her legs, put on socks, or
28 tie her shoes. Tr. 49. Plaintiff also said she cannot vacuum or

1 sweep, and climbing stairs is "awful" and to navigate stairs, she
2 must hold onto the railing and move slowly. Tr. 49-50; 52. She
3 said her evening sleep is interrupted every hour due to pain, as
4 well as numbness in her hands. Tr. 50. Plaintiff estimated that in
5 an eight-hour day, she is lying down for five to six hours. Tr. 52.
6 She smokes half a pack of cigarettes every day. Tr. 205.

7 Plaintiff's previous work includes retail sales clerk, cashier,
8 floor attendant at a bingo hall, and appointment clerk. Tr. 60-61.

9 **ADMINISTRATIVE DECISION**

10 At step one, ALJ Hebda found that Plaintiff had not engaged in
11 substantial gainful activity since November 1, 2005. Tr. 19. At
12 step two, he found Plaintiff had the severe impairment of discogenic
13 disorders of the back. Tr. 19. At step three, the ALJ determined
14 Plaintiff's impairments, alone and in combination, did not meet or
15 medically equal one of the listed impairments in 20 C.F.R., Subpart
16 P, Appendix 1 (20 C.F.R. §§ 416.920(d), 416.925 and 416.926). Tr.
17 20. The ALJ found Plaintiff has the residual functional capacity
18 ("RFC") to perform light work, with the following limitations:

19 The claimant can lift or carry 20 pounds occasionally and
20 frequently lift or carry 10 pounds. The claimant can sit
21 for six hours and stand or walk for four hours in an
22 eight-hour workday. She can occasionally climb ramps and
23 stairs, but never climb ladders, ropes, and scaffolds.
She can occasionally stoop, kneel, crouch and crawl. She
can have no concentrated exposure to vibrations or
unprotected heights.

24 Tr. 20. In step four findings, the ALJ found Plaintiff's statements
25 regarding pain and limitations were not credible to the extent they
26 were inconsistent with the RFC findings. Tr. 21-23. The ALJ found
27 that Plaintiff is capable of performing past relevant work as a
28 cashier II and appointment clerk. Tr. 27. In the alternative, a

1 significant number of jobs exist in national economy that Plaintiff
2 could perform, such as information clerk and agricultural sorter.
3 Tr. 27-28.

4 STANDARD OF REVIEW

5 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
6 court set out the standard of review:

7 A district court's order upholding the Commissioner's
8 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
9 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
10 Commissioner may be reversed only if it is not supported
11 by substantial evidence or if it is based on legal error.
12 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
13 Substantial evidence is defined as being more than a mere
14 scintilla, but less than a preponderance. *Id.* at 1098.
15 Put another way, substantial evidence is such relevant
16 evidence as a reasonable mind might accept as adequate to
17 support a conclusion. *Richardson v. Perales*, 402 U.S.
18 389, 401 (1971). If the evidence is susceptible to more
19 than one rational interpretation, the court may not
20 substitute its judgment for that of the Commissioner.
21 *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of*
22 *Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

23 The ALJ is responsible for determining credibility,
24 resolving conflicts in medical testimony, and resolving
25 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
26 Cir. 1995). The ALJ's determinations of law are reviewed
27 *de novo*, although deference is owed to a reasonable
28 construction of the applicable statutes. *McNatt v. Apfel*,
29 201 F.3d 1084, 1087 (9th Cir. 2000).

30 It is the role of the trier of fact, not this court, to resolve
31 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
32 supports more than one rational interpretation, the court may not
33 substitute its judgment for that of the Commissioner. *Tackett*, 180
34 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
35 Nevertheless, a decision supported by substantial evidence will
36 still be set aside if the proper legal standards were not applied in
37 weighing the evidence and making the decision. *Browner v. Secretary*
38 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If

1 substantial evidence exists to support the administrative findings,
2 or if conflicting evidence exists that will support a finding of
3 either disability or non-disability, the Commissioner's
4 determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
5 1230 (9th Cir. 1987).

6 SEQUENTIAL PROCESS

7 The Commissioner has established a five-step sequential
8 evaluation process for determining whether a person is disabled. 20
9 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S.
10 137, 140-42 (1987). In steps one through four, the burden of proof
11 rests upon the claimant to establish a prima facie case of
12 entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-99.
13 This burden is met once a claimant establishes that a physical or
14 mental impairment prevents him from engaging in his previous
15 occupation. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). If a
16 claimant cannot do his past relevant work, the ALJ proceeds to step
17 five, and the burden shifts to the Commissioner to show that (1) the
18 claimant can make an adjustment to other work; and (2) specific jobs
19 exist in the national economy which claimant can perform. *Batson v.*
20 *Commissioner of Social Sec. Admin.*, 359 F.3d 1190, 1193-94 (2004).
21 If a claimant cannot make an adjustment to other work in the
22 national economy, a finding of "disabled" is made. 20 C.F.R. §§
23 404.1520(a)(4)(I-v), 416.920(a)(4)(I-v).

24 ISSUES

25 The question presented is whether substantial evidence exists
26 to support the ALJ's decision denying benefits and, if so, whether
27 that decision is based on proper legal standards. Plaintiff
28 contends the ALJ erred by improperly discrediting her testimony and

1 by finding her impairments did not meet Listing 1.04A. ECF No. 14
2 at 10-12. Defendant responds the ALJ's decision is supported by
3 substantial evidence, additional evidence was not warranted, and her
4 findings are free of legal error. ECF No. 20.

5 DISCUSSION

6 A. Credibility

7 Plaintiff contends that the ALJ erred by finding her testimony
8 lacked credibility. ECF No. 14 at 10. The ALJ is responsible for
9 determining credibility, resolving conflicts in medical testimony,
10 and resolving ambiguities. *Reddick v. Chater*, 157 F.3d 715, 722
11 (9th Cir. 1998). The ALJ's findings must be supported by
12 "specific," "cogent" reasons. *Reddick*, 157 F.3d at 722. If a
13 claimant produces objective medical evidence of an underlying
14 impairment, an ALJ may not reject a claimant's subjective complaints
15 of pain based solely on lack of medical evidence. *Burch v.*
16 *Barnhart*, 400 F.3d 676, 680 (9th Cir. 2005). See also *Light v. Soc.*
17 *Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997) (holding that an ALJ
18 may not discredit a claimant's subjective testimony on the basis
19 that there is no objective medical evidence that supports the
20 testimony). Unless there is affirmative evidence showing that the
21 claimant is malingering, the ALJ must provide "clear and convincing"
22 reasons for rejecting pain testimony. *Burch*, 400 F.3d at 680.
23 General findings are insufficient; the ALJ must identify what
24 testimony is not credible and what evidence undermines the
25 claimant's complaints. *Reddick*, 157 F.3d at 722.

26 The reasons the ALJ gives for rejecting a claimant's testimony
27 must be supported by substantial evidence in the record.
28 *Regennitter v. Comm'r of Soc. Sec. Admin.*, 166 F.3d 1294, 1296 (9th

1 Cir. 1999). If substantial evidence exists in the record to support
2 the ALJ's credibility finding, the court will not engage in
3 second-guessing. *Thomas v. Barnhart*, 278 F.3d 947, 959 (9th Cir.
4 2002). When the evidence can support either outcome, the court may
5 not substitute its judgment for that of the ALJ. *Tackett*, 180 F.3d
6 at 1098.

7 In evaluating credibility, the ALJ may engage in ordinary
8 techniques of credibility evaluation, including considering
9 claimant's reputation for truthfulness and inconsistencies in
10 claimant's testimony, or between claimant's testimony and conduct,
11 claimant's daily activities, claimant's work record, and testimony
12 from physicians and third parties concerning the nature, severity
13 and effect of the symptoms of which claimant complains. *Thomas*, 278
14 F.3d at 958-59. Also, the ALJ may consider the location, duration
15 and frequency of symptoms; factors that precipitate and aggravate
16 those symptoms; the amount and side effects of medications; and
17 treatment measures taken by the claimant to alleviate those
18 symptoms. See SSR 96-7p.

19 In this case, the ALJ found Plaintiff's testimony about the
20 intensity, persistence and limiting effects of her symptoms were not
21 credible to the extent they were inconsistent with the RFC. Tr. 21.
22 The ALJ's reasons for finding Plaintiff lacked credibility are
23 specific, cogent and supported by substantial evidence in the
24 record. For example, the ALJ noted that the objective medical
25 evidence revealed Plaintiff had multilevel degenerative disc disease
26 at L3-4, L4-5 and L5-S1, but the herniated disc at L5-S1 that was
27 the subject of her present disability claim had resolved by May 24,
28 2007. Tr. 22; 206; 268; 304. Also, on July 14, 2006, Ronald

1 Vincent, M.D., a neurological surgeon, examined Plaintiff, noted
2 evidence of a pre-existing condition of degenerative disc disease at
3 L3-4, L4-5 and L5-S1, opined her herniated disc at L5-S1 was
4 unrelated to the degenerative disc disease, and observed the
5 herniation had "essentially resolved." Tr. 206. Also, Dr. Vincent
6 noted that Plaintiff "has had three years of extensive narcotic
7 usage and would be even a poor candidate for this surgery due to a
8 very fixed condition of a disability conviction that has probably
9 been present now for three years or more." Tr. 206.

10 Additionally, in determining credibility, the ALJ relied upon
11 evidence in the record that indicated Plaintiff exaggerated her
12 symptoms. Tr. 22-23. The record supports this reasoning. For
13 example, Dr. Vincent's diagnoses for Plaintiff included "[n]arcotic
14 dependency with symptom embellishment..." Tr. 206. Similarly, in
15 an April 6, 2007, examining orthopedist Charles Larson, M.D., and
16 neurologist J. Greg Zoltani, M.D., noted that Plaintiff exhibited
17 "significant pain behavior," but after the appointment, she was
18 observed waiting for a taxi, sitting on the curb and was,

19 [T]wisting with full range of motion to the lumbar spine
20 and free movement without any evidence of discomfort,
21 which is in total contradiction to her abilities while
22 being examined and moaning and groaning and being able to
barely walk across the exam room. Add the diagnosis of
probable willful misrepresentation of her medical
condition to her providers.

23 Tr. 227-28. Additionally, during the same exam, the physicians
24 noted "Waddell's testing² times three was markedly positive." Tr.

25
26 ²While the Waddell test does not by itself constitute
27 "affirmative evidence" of malingering, the test establishes five
28 "signs" of nonorganic sources of lower back pain, but does not

1 225-26. Amplification of symptoms can constitute substantial
2 evidence supporting the rejection of a subjective complaint
3 concerning the severity of symptoms. *Matthews v. Shalala*, 10 F.3d
4 678, 680 (9th Cir. 1993). The examining physicians' observations,
5 coupled with the MRI results that revealed "near complete
6 resolution" of Plaintiff's left lateral recess protrusion at L5-S1,
7 give rise to a reasonable inference that Plaintiff engaged in
8 purposeful exaggeration of her symptoms.

9 Also, in finding Plaintiff not credible, the ALJ relied upon
10 Plaintiff's failure to attend all her regularly scheduled physician
11 appointments and physical therapy appointments, both of which are
12 supported by the record. Tr. 22-23; 319-27; 374-415. See *Fair v.*
13 *Bowen*, 885 F.2d at 603-04 (claiming severe conditions yet receiving
14 minimal, conservative, or no treatment is a basis to reject
15 claimant's testimony; additionally, failure to follow prescribed).

16 In sum, the ALJ provided proper, specific reasons for
17 discrediting Plaintiff's testimony and identified specific testimony
18 and objective medical evidence that supported the negative
19 credibility finding.

20 **B. Listing 1.04A**

21 Plaintiff contends that the ALJ, and the Appeals Council, erred
22 by failing to find that Plaintiff's impairments met Listing 1.04A
23 for Disorders of the Spine. To meet a listing, a claimant's
24 impairments must "meet all of the specified medical criteria."

25 _____
26 distinguish between malingering and psychological conditions. See
27 Gordon Waddell, et al., *Nonorganic Physical Signs in Low-Back Pain*,
28 5 Spine 117, 117-25 (Mar.-Apr. 1980).

1 *Sullivan v. Zebley*, 493 U.S. 521, 530, 110 S.Ct. 885, 107 L. Ed. 2d
 2 967 (1990). "An impairment that manifests only some of those
 3 criteria, no matter how severely, does not qualify." *Id.* Listing
 4 1.04A provides:

5 1.04 Disorders of the spine (e.g., herniated nucleus
 6 pulposus, spinal arachnoiditis, spinal stenosis,
 7 osteoarthritis, degenerative disc disease, facet
 8 arthritis, vertebral fracture), resulting in compromise of
 a nerve root (including the cauda equina) or the spinal
 cord. With:

9 A. Evidence of nerve root compression characterized
 10 by neuro-anatomic distribution of pain, limitation of
 11 motion of the spine, motor loss (atrophy with associated
 12 muscle weakness or muscle weakness) accompanied by sensory
 or reflex loss and, if there is involvement of the lower
 back, positive straight-leg raising test (sitting and
 supine)

13 20 C.F.R. Pt. 404, Subpt. P, App. 1. In determining Plaintiff did
 14 not meet the requirements of Listing 1.04A, the ALJ explained:

15 [C]laimant's spinal impairment does not meet or medically
 16 equal a Listing for 1.04, *disorders of the spine*. There
 17 is no evidence of nerve root compression characterized by
 18 neuroanatomic distribution of pain, limitation of motion
 19 of the spine, motor loss accompanied by sensory or reflex
 loss, and positive straight leg raising test. There is
 also no evidence of spinal arachnoiditis or lumbar spinal
 stenosis resulting in the inability to ambulate
 [e]ffectively.

20 Tr. 20. It is claimant's responsibility to prove that she is
 21 disabled at step three of the sequential evaluation process. 20
 22 C.F.R. §§ 404.1520(a)(4)(iii), 404.1520(d). The claimant bears the
 23 burden of establishing that her impairments satisfy the requirements
 24 of a Listings impairment. *Tackett*, 180 F.3d at 1098-99.

25 Plaintiff contends that evidence existed of nerve root
 26 compression characterized by neuroanatomic distribution of pain,
 27 limitation of motion of the spine, motor loss accompanied by sensor
 28 or reflex loss, and positive straight leg raising test. ECF No. 14

1 at 10-12. In support of this argument, Plaintiff recites findings
2 from several medical visits, but on review, none of the evidence
3 cited supports the assertion she meets Listing 1.04A.

4 While the objective medical evidence reveals that Plaintiff
5 suffers from degenerative disc disease, this alone does not
6 establish she meets Listing 1.04A. To meet the Listing, evidence
7 must exist of nerve root compromise in addition to evidence of the
8 nerve root compression characterized by certain symptoms. In this
9 case, Plaintiff's MRI scans did not reveal compromise of a nerve
10 root or spinal cord, or evidence of nerve root compression. For
11 example, Laura A. Hotchkiss, M.D., interpreted Plaintiff's MRI of
12 the lumbar spine from December 13, 2005, and noted at L4-5,
13 Plaintiff had a disc protrusion/herniation that abutted the
14 descending L5 nerve root on the left, but the neural foramina were
15 patent. Tr. 298. Additionally, Dr. Vincent reviewed the MRI
16 findings from December 13, 2005, and opined that the test results
17 provided "no evidence of nerve root compression seen or central
18 canal compromise... [n]o neural foraminal encroachment was
19 identified and no definite nerve root effacement or displacement was
20 identified." Tr. 202. Eric W. Rudd, M.D., examined Plaintiff on
21 July 25, 2006, and after reviewing the December 2005 MRI, he
22 concluded that the disc herniation had mostly resolved and "was no
23 longer impinging on nerve roots...." Tr. 216. A March 27, 2007,
24 MRI revealed "no evidence of a new focal increase in the central
25 canal or foraminal narrowing is seen." Tr. 268. A May 24, 2007,
26 MRI indicated mild degenerative spondylosis of the mid cervical
27 spine without evidence of high-grade foraminal stenosis. Tr. 267.
28 The evidence fails to support Plaintiff's assertion that her

1 condition meet Listing 1.04A.

2 The new evidence submitted to the Appeals Council also fails to
3 establish Plaintiff meets Listing 1.04A. The new evidence consists
4 of a form Documentation Request for Medical or Disability Condition
5 completed on October 7, 2010, by Judith M. Randall, ARNP. Tr. 418-
6 20. Nurse Randall indicated that Plaintiff is unable to look for
7 work due to disc degeneration and bulging discs in her lumbar spine
8 accompanied by stenosis. Tr. 418-19. However, the form is dated
9 ten months after the ALJ's decision and nowhere does the form
10 indicate that it relates to Plaintiff's condition prior to the ALJ's
11 determination. "If new and material evidence is submitted, the
12 Appeals Council shall consider the additional evidence only where it
13 relates to the period on or before the date of the administrative
14 law judge hearing decision." 20 C.F.R. § 404.970(b).

15 In this case, the newly submitted evidence contains no
16 indication that it relates to the period on or before the date of
17 the ALJ's decision, and thus, the evidence will not be considered.
18 As a result, the record lacks evidence that would support a finding
19 that Plaintiff's condition met Listing 1.04A.

20 CONCLUSION

21 Having reviewed the record and the ALJ's findings, the court
22 concludes the ALJ's decision is supported by substantial evidence
23 and is not based on legal error. Accordingly,

24 IT IS ORDERED:

25 1. Defendant's Motion for Summary Judgment, **ECF No. 19**, is
26 **GRANTED**.

27 2. Plaintiff's Motion for Summary Judgment, **ECF No. 13**, is
28 **DENIED**.

1 The District Court Executive is directed to file this Order and
2 provide a copy to counsel for Plaintiff and Defendant. Judgment
3 shall be entered for **DEFENDANT** and the file shall be **CLOSED**.

4 DATED May 29, 2013.

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6 S/ CYNTHIA IMBROGNO
7 UNITED STATES MAGISTRATE JUDGE
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